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Jack Tsen-Ta Lee*

Abstract: When interpreting the fundamental liberties in the Singapore Constitution, courts presently do not engage in a proportionality analysis – that is, a consideration of whether limitations on rights imposed by executive or legislative action bear a rational relation with the object of the action, and, if so, whether the limitations restrict rights as minimally as possible. The main reason for this appears to be the expansive manner in which exceptions to the fundamental liberties are phrased, and the courts' deferential attitude towards the political branches of government. This paper considers how the rejection of proportionality has affected the rights to freedom of expression and assembly, and freedom of religion, and argues that although proportionality was originally a European legal doctrine, its use in Singapore is not only desirable but necessary if the Constitution is to be regarded as guaranteeing fundamental liberties instead of merely setting out privileges that may be abridged at will by the Government.

Keywords: Constitutional interpretation, fundamental liberties, human rights, proportionality, Singapore

Few fundamental liberties that are guaranteed by bills of rights are expressed to be absolute. In many common law jurisdictions, the legislature is permitted to impose restrictions on rights for specified reasons and under particular conditions. However, constitutional or bill of rights texts often do not expressly indicate how the courts should determine that applicants' rights have been legitimately restricted. To this end, courts in jurisdictions such as Canada, South Africa and the United Kingdom have adopted the European doctrine of proportionality, which essentially requires them to balance opposing types of public interests – the interest sought to be protected by the rights in question, and other public interests such as national security, the protection of people's reputation and public order.

The Singapore courts currently appear averse to taking a proportionality approach in constitutional adjudication. This paper examines why, and argues that such an approach would be consonant with the text of the Constitution and would allow the courts to perform their role of checking executive and legislative power more effectively. Part I of the paper explains what a proportionality analysis involves, while Part II discusses the current position in Singapore and the justifications for it. Thereafter, it is argued in Part III that despite the taciturn nature of the Singapore Constitution – the lack of terms such as

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'reasonable restrictions' or 'restrictions necessary in a democratic society' that the courts might hang a proportionality analysis on to – the adoption of proportionality is consistent with the text and its history as well as some of the Singapore courts' jurisprudence, and would avoid problems associated with the current interpretive methodology. Part IV considers commensurability and the devaluation of rights, two major issues associated with the balancing of rights and other public interests, and submits they are not as troublesome as might be supposed. Part V contains concluding thoughts, and ultimately suggests that the bill of rights in the Singapore Constitution should be interpreted according to its spirit and not to the letter.

I. Proportionality Analysis

Written constitutions that contain bills of rights generally do not express in absolute terms the fundamental rights therein. In other words, most rights are subject to legitimate limitations on specified grounds imposed by the legislature. For example, Article 10(1) of the European Convention on Human Rights[1] guarantees the right to freedom of expression, while Article 10(2) provides, in the following terms, that restrictions on the right may be imposed:

> 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Similarly, fundamental liberties are guaranteed by the Canadian Charter of Rights and Freedoms,[2] but section 1 of the Charter states that they are subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In the presence of such limitation clauses, when a litigant presents a plausible argument that an activity lies within a liberty guaranteed to him or her by the constitution, it is incumbent on the court to consider if the government has presented sufficient public interest reasons showing that limitations are reasonable and proportional.

Commentators have noted that the application of proportionality analysis in rights adjudication is now widespread, particularly in jurisdictions on the 'new constitutionalism' model. The characteristics of this model of government include (1) a written constitution establishing and empowering institutions of government; (2) ultimate power placed in the hands of the people through regular elections or referenda; (3) the subjection of public authority to the constitution; (4) the existence of a bill of rights and a judicial review system ensuring that rights are upheld; and (5) procedures specified in the

1 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS 5, 213 UNTS 221, given legal effect in the United Kingdom by the Human Rights Act 1998 (UK), ss 1(1)–(3) read with Sch 1.

2 Pt I of the Constitution Act 1982 (Canada), which was itself enacted as Sch B to the Canada Act 1982 (UK).

constitution for its revision.[3] Thus, in *R v Oakes*[4] the Supreme Court of Canada held that a proportionality analysis was to be applied when determining if a law limiting a right guaranteed by the Canadian Charter could be upheld under section 1 of the Charter as 'reasonable' and 'demonstrably justified in a free and democratic society'. So, too, has the European Court of Human Rights employed a proportionality approach to the necessity clauses qualifying European Convention rights. This is evident in such cases as *Dudgeon v United Kingdom*[5] which held that interference with a right cannot be regarded as necessary in a democratic society unless it is proportionate to a legitimate aim pursued by the legal restriction in question.[6] When the Human Rights Act 1998 (UK)[7] came into force in 2000, providing aggrieved persons with remedies in domestic law for breaches of Convention rights, the House of Lords confirmed that a proportionality analysis would be applied to necessity clauses.[8]

In general, adopting a proportionality approach can be said to be a four-stage process:

i. First, there is a consideration of whether the government is legally authorized to enact the restrictive measure in question.
ii. Secondly, an assessment is carried out as to whether there is a rational relation between the means adopted in the measure and the stated policy objectives of the measure. This is often known as the test of suitability.
iii. Thirdly, the measure must be found to infringe rights as minimally as possible. This is known as the test of necessity.
iv. Finally, there is an examination of whether the benefits of the measure outweigh the costs arising from a curtailment of rights. This is often termed 'proportionality in the narrow sense'.[9]

As might be imagined, the manner in which proportionality is applied differs slightly from jurisdiction to jurisdiction.[10] A detailed comparison is beyond the scope of this paper. Instead, I will focus on some potential difficulties with proportionality, and whether the approach is applicable to the bill of rights in the Singapore Constitution,[11] which does not expressly require courts to balance the costs of limiting fundamental liberties against legislative goals.

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3 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Colum J Transnat'l L 72, 84-85.

4 [1986] 1 SCR 103 (SC, Canada). The proportionality analysis has been refined in subsequent cases such as *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 (SC, Canada); and *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 (SC, Canada).

5 (1981) 4 EHRR 149.

6 Ibid 165, [53], applying *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, [49], and *Young, James & Webster v United Kingdom* (1981) 4 EHRR 38, 56, [63].

7 Human Rights Act 1998 (UK) (n 1).

8 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, 547, [27], citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30, [1999] 1 AC 69, 80 (PC on appeal from Antigua and Barbuda).

9 Stone Sweet and Mathews (n 3) 75-76.

10 For instance, it has been pointed out that the ECtHR does not regard the first stage as part of the proportionality analysis: ibid 75, n 8. The test applied by the House of Lords in *Daly* (n 8) omitted the first and fourth stages, and included before stage 2 a consideration of whether the legislative objective is sufficiently important to justify limiting a fundamental right. Arguably, this consideration can be regarded as part of stage 2 of the four-stage schema set out in the main text.

11 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep).

II. Judicial Attitudes towards Proportionality in the Context of the Singapore Constitution

A. Judicial Review under the Constitution

Like many common law jurisdictions, Singapore does not have a constitutional court having exclusive authority to decide disputes relating to the Constitution.[12] All cases apart from those regarded as routine[13] are dealt with by the Supreme Court of Singapore, which determines private law cases as well. The Supreme Court consists of the High Court, the superior court of first instance; and the Court of Appeal which is Singapore's highest appellate court. The latter recently reaffirmed that the nation's Westminster-model legal system 'is based on the supremacy of the Singapore Constitution, with the result that the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void'.[14]

However, over the years applicants have generally had little success in convincing the Supreme Court that their fundamental liberties guaranteed by Part IV of the Singapore Constitution have been infringed. This can be put down to a number of overlapping reasons. For one thing, the courts hold that a 'strong presumption of constitutional validity'[15] applies when legislation or executive action is challenged.[16] The effect of the presumption is that the applicant does not simply establish a *prima facie* case in order to shift to the Government the evidential burden of showing that the action is constitutional, but bears the burden of proving that there has been 'a clear transgression of the constitutional principles'. In assessing whether the presumption has been displaced, the court 'may

12 Art 100(1) of the Constitution provides that the President may refer to a tribunal of not less than three Supreme Court judges for its opinion 'any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise'. However, the President's discretion to refer such matters must be exercised in accordance with the advice of the Cabinet or a minister acting under the Cabinet's general authority: Art 21(1). In this respect, the President has no power to exercise personal discretion or act against Cabinet's advice: cf *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, 1262, [157], and 1272, [180] (CA, Singapore) ('*Yong Vui Kong v AG*'). Thus, persons may not have constitutional questions referred by the President to the Constitution of the Republic of Singapore Tribunal as of right.

13 It has been suggested by the High Court that '[w]here questions of law have already been decided or principles relating to an article in the Constitution have been set out by the superior courts, a subordinate court […] should proceed to apply the relevant case law or extrapolate from the principles enunciated to reach a proper conclusion on the facts before it'. *Johari bin Kanadi v Public Prosecutor* [2008] 3 SLR(R) 422, 430, [9] (HC, Singapore).

14 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947, 958, [14] (CA, Singapore). See also *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209, 231, [50] (HC, Singapore) ('*Chan Hiang Leng Colin v PP*') ('The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides.'), and *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489, 516, [89] (CA, Singapore) ('*Taw Cheng Kong* (CA)') ('The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land.')

15 *Taw Cheng Kong* (CA), ibid 509, [60], applied in *Johari bin Kanadi* (n 13) 430, [10], and *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, 162, [103] (HC, Singapore).

16 As regards executive action, see *Ramalingam Ravinthran v Public Prosecutor* [2012] 2 SLR 49, 70, [43]-[44], in which the Court of Appeal held that since the Constitution vests the power to prosecute persons accused of crimes in the Attorney-General, this power is equal in status to the judicial power vested in the courts. Thus, 'the courts should presume that the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise'.

take into consideration matters of common knowledge, matters of common report, the history of the time and may assume every state of facts which can be conceived existing at the time of legislation',[17] which greatly assists the Government. In contrast, the applicant has a heavy onus to discharge:

> '[U]nless the law is plainly arbitrary on its face, postulating examples of arbitrariness would ordinarily not be helpful in rebutting the presumption of constitutionality. This is because another court or person can well postulate an equal number if not more examples to show that the law did not operate arbitrarily. […] Therefore, to discharge the burden of rebutting the presumption, it will usually be necessary for the person challenging the law to adduce some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily.'[18]

In *Lim Meng Suang and another v Attorney-General*,[19] the High Court found that section 377A of the Penal Code,[20] which criminalizes acts of 'gross indecency' between male persons occurring in public or private, does not violate the rights to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution.[21] Among other things, the Court took the view that the applicants, a gay couple, had failed to displace the presumption that the provision is constitutional. They had not adduced 'compelling or cogent material or factual evidence' to show that section 377A cannot serve the purpose of signalling disapproval of male homosexual conduct in view of the Government's policy not to enforce it against consensual acts,[22] that it is illegitimate because it targets only male and not female homosexual conduct,[23] or that it is arbitrary or operates in an arbitrary manner.[24]

Particularly in the 1990s and early 2000s, the courts also tended to adopt highly literal interpretations of constitutional provisions. This is aptly illustrated by *Rajeevan Edakalavan v Public Prosecutor*.[25] Article 9(3) of the Constitution states that '[w]here a person is arrested, he […] shall be allowed to consult and be defended by a legal practitioner of his choice'. The issue in the case was whether arrested persons enjoy an ancillary right to be informed of their right to counsel by the authorities. The High Court held that they do not, as Article 9(3) is silent on the matter. In its view, it would be inappropriate for the Court to hold that such a right exists for the following reason:

> 'Any proposition to broaden the scope of the rights accorded to the accused should be addressed in the political and legislative arena. The Judiciary, whose duty is to ensure that the intention of Parliament as reflected in the Constitution and other legislation is adhered to, is an inappropriate forum. The Members of Parliament are

17 *Lee Keng Guan v Public Prosecutor* [1977-1978] SLR(R) 78, 86, [19] (HC, Singapore), citing *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538, 547 et seq (SC, India). *Lee Keng Guan* was cited in *Taw Cheng Kong* (CA) (n 14) 513, [79].
18 *Taw Cheng Kong* (CA), ibid 514, [80], cited in *Lim Meng Suang* (n 15) 163-164, [105].
19 *Lim Meng Suang*, ibid.
20 Cap 224, 2008 Rev Ed.
21 The High Court reached the same conclusion in *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 (HC, Singapore). As of the time of writing, appeals against the two judgments to the Court of Appeal were pending.
22 *Lim Meng Suang* (n 15) 162, [101].
23 ibid 169, [118].
24 ibid 173, [131].
25 [1998] 1 SLR(R) 10 (HC, Singapore).

> freely elected by the people of Singapore. They represent the interests of the constituency who entrust them to act fairly, justly and reasonably. The right lies in the people to determine if any law passed be [sic: by] Parliament goes against the principles of justice or otherwise. This right, the people exercise through the ballot box. […] The sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in Parliament who are the ones chosen by us to address our concerns. This is especially so with regards to matters which concern our well-being in society, of which fundamental liberties are a part.'[26]

In similar vein, in *Public Prosecutor v Mazlan bin Maidun*[27] the Court of Appeal declined to hold that the right to silence is a constitutional right within the scope of Article 9(1), which states that '[n]o person shall be deprived of his life or personal liberty save in accordance with law'. If it did so, that would 'elevate an evidential rule to constitutional status despite its having been given no explicit expression in the Constitution. Such an elevation requires in the interpretation of Art 9(1) a degree of adventurous extrapolation which we do not consider justified.'[28]

Finally, the courts have been fairly resistant to assessing the fairness or reasonableness of legislation. In *Jabar bin Kadermastan v Public Prosecutor*,[29] the Court said: 'Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.'[30] Though the Court subsequently clarified in *Yong Vui Kong v Public Prosecutor*[31] that laws must comply with fundamental rules of natural justice in order not to offend Article 9,[32] it affirmed that the provision warranted no 'fair, just and reasonable procedure' test as this is 'too vague a test of constitutionality', and is undesirable because it 'hinges on the court's view of the reasonableness of the law in question, and requires the court to intrude into the legislative sphere of Parliament as well as engage in policy making'.[33]

The general reluctance of the courts to exercise constitutional judicial review in favour of applicants may be explainable by the dominance of the political branches of government – the executive and the legislature – in the Singapore political and legal system. Since the People's Action Party (PAP) swept to power in the 1959 general election, this political party has held more than a two-thirds majority of the elected seats in Parliament and has formed the Government. At present, it holds 80 out of the 87 seats; that is, a majority of about 92%. Combined with the system of strong party discipline inherited from the British which ensures that PAP Members of Parliament (MPs) vote according to the party line, the party's overwhelming parliamentary majority guarantees

26 ibid 19, [21].
27 [1992] 3 SLR(R) 968 (CA, Singapore).
28 ibid 973, [15].
29 [1995] 1 SLR(R) 326 (CA, Singapore). See also *Rajeevan Edakalavan* (n 25) 19, [21]: 'The Judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective. If anybody has the right to decide, it is the people of Singapore.'
30 ibid 343, [52].
31 [2010] 3 SLR 489 (CA, Singapore) ('*Yong Vui Kong v PP*').
32 As stated in *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR(R) 710, 722, [26] (PC on appeal from Singapore), cited in *Yong Vui Kong v PP*, ibid 500-501, [17]-[18].
33 *Yong Vui Kong v PP*, ibid 526-527, [80].

that it is able to enact primary legislation[34] and constitutional amendments[35] without difficulty. Thus, although in form Singapore's legal system is based on the doctrine of constitutional sovereignty – a point espoused by the judiciary, as we have already seen – in practice elements of the parliamentary sovereignty doctrine may hold sway.[36]

The Chief Justice and other Supreme Court judges are not appointed by an independent judicial appointments panel. Instead, the Prime Minister nominates a candidate for Chief Justice to the President, who may exercise personal discretion to veto the nomination if he thinks fit.[37] The President is required to consult the Council of Presidential Advisers before exercising this function;[38] and if, contrary to the Council's recommendation, he refuses to make an appointment, the refusal may be overridden by Parliament on a vote of not less than two-thirds of the total number of elected MPs.[39] The procedure for the appointment of other Supreme Court judges is the same, except that the Prime Minister is also required to consult the Chief Justice before nominating candidates to the President.[40] To date, no elected President has declined to follow the Prime Minister's advice in appointing a judge. It is submitted that since the Government essentially steers the system of judicial appointment, it is unsurprising that it selects candidates who share its values and belief in the desirability of a strong government. There is little incentive for the Government to seek out candidates who disagree with this ethos.

The result is a judiciary that by and large feels the Government is better placed than it is to decide what is best for Singapore society. This outlook is strikingly illustrated by the Court of Appeal's judgment *Jeyaretnam Kenneth Andrew v Attorney-General*.[41] The appellant, who is the Secretary-General of the Reform Party, one of the political parties in Singapore, had applied for judicial review of the Government's decision to grant a contingent loan of US$ 4 billion to the International Monetary Fund. He claimed that Article 144 of the Constitution, properly interpreted, required the loan to have been approved by Parliament and the President. One issue that arose was whether the appellant had standing to bring the claim. In an unusually philosophical judgment, the Court endorsed the views of former Chief Justice Chan Sek Keong given during an ex-curial speech given in 2010.[42]

Chan CJ had expressed a preference for the 'green-light' approach towards administrative law. In *Jeyaretnam* the Court explained that under this approach 'public administration is not principally about stopping bad administrative practices but encouraging good ones: "in other words, seek good government through the political process and

34 Which requires a majority of the votes of the Members of Parliament present and voting: Constitution, Art 57(1).

35 Most constitutional amendments require votes of not less than two-thirds of the total number of elected MPs on the Second and Third Readings of the constitutional amendment bill: Constitution, Art 5(2).

36 For a more detailed discussion, see Jaclyn Ling-Chien Neo and Yvonne C L Lee, 'Constitutional Supremacy: Still a Little Dicey?' in Li-ann Thio and Kevin Y L Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge-Cavendish 2009) 153-192.

37 Constitution, Arts 22(1)(a) and 95(1).

38 ibid Art 21(3).

39 ibid Art 22(2).

40 ibid Art 95(2).

41 [2014] 1 SLR 345 (CA, Singapore).

42 Chan Sek Keong, 'Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students' (2010) 22 Sing Acad LJ 469.

public avenues rather than redress bad government through the courts.'"[43] Thus, '[u]nder a green-light approach, the courts can play their role in promoting the public interest by applying a more discriminating test of *locus standi* to balance the rights of the individual and the rights of the state in the implementation of sound policies in a lawful manner'.[44] This was to be contrasted with the 'red-light' approach 'where the courts exist in a combative relationship with the Executive, functioning as a check on the latter's administrative powers'.[45] Chan CJ had alluded to the fact that a liberal standing test would allow 'too many unmeritorious cases to be fought, which could seriously curtail the efficiency of the Executive in practising good governance'.[46] The result of the Court of Appeal adopting a green-light approach in the *Jeyaretnam* case was that the appellant was found not to have standing to challenge the Government's alleged breach of the Constitution. He could show neither that a private right of his (such as a fundamental liberty guaranteed to him) had been breached, nor that a public right enjoyed by all had been breached and he had suffered special damage.[47] Although the Court did hold that 'in the rare case where a non-correlative rights generating public duty is breached, and the breach is of sufficient gravity such that it would be in the public interest for the courts to hear the case, an applicant *sans* rights may be accorded *locus standi* as well, at the discretion of the courts', this was not such a case because the appellant had also 'failed to show that the Government had in any way breached its duties under Art 144'.[48]

B. Judicial Attitudes towards Proportionality

The Singapore courts' preference for a green-light approach towards judicial review, which is reflected by their tendency to read the Constitution literally and their aversion to assessing the reasonableness of laws, explains to a large extent the current judicial attitude towards proportionality in constitutional interpretation. Like the Canadian Charter and the European Convention, various provisions of the Singapore Constitution guarantee fundamental liberties to all persons (or, in some cases, to Singapore citizens),[49] but permit legislative restrictions to be imposed for specific purposes. Articles 14(1) and (2) of the Constitution, for instance, read as follows:

> '14.— (1) Subject to clauses (2) and (3) —
> (a) every citizen of Singapore has the right to freedom of speech and expression;
> (b) all citizens of Singapore have the right to assemble peaceably and without arms; and
> (c) all citizens of Singapore have the right to form associations.
> (2) Parliament may by law impose —
> (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part

43 *Jeyaretnam* (n 41) 364, [48], citing Chan, ibid 480, [29].
44 *Jeyaretnam*, ibid 364, [49], citing Chan, ibid 481, [34].
45 *Jeyaretnam*, ibid.
46 *Jeyaretnam*, ibid, citing Chan (n 42) 481, [33].
47 *Jeyaretnam*, ibid 362–364 and 371, [46]–[47] and [64].
48 Ibid 371, [64]–[65].
49 See the Constitution, Art 12(2) (prohibition of certain forms of discrimination), Art 13 (prohibition of banishment, and freedom of movement), Art 14 (rights to freedom of speech and expression, assembly and association), and Art 16 (rights in respect of education).

thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;

(b) on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and

(c) on the right conferred by clause (1)(c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.'

A limitation clause is also to be found in Article 15. While Article 15(1) states that '[e]very person has the right to profess and practise his religion and to propagate it', clause (4) provides that the Article 'does not authorise any act contrary to any general law relating to public order, public health or morality'.

One significant difference between these clauses and analogous provisions in the European Convention and the Canadian Charter is that the former do not contain any words significantly qualifying the ability of the Singapore Parliament to restrict the fundamental liberties in question. Thus, on a plain reading, Article 15(4) appears to permit Parliament to enact general laws relating to public order, public health and morality that have the effect of curtailing religious rights, without any requirement that the laws are reasonable and necessary in a democratic society. Article 14(2) does introduce tests of necessity and expediency, but, as we will see shortly,[50] they do not operate as appreciable constraints on Parliament's lawmaking powers. Furthermore, the tests do not apply to some of the grounds listed in Article 14(2)(a), ostensibly authorizing Parliament to impose outright on the freedom of speech and expression 'restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence'.

In view of the manner in which these constitutional provisions are drafted, the Singapore courts have, to date, largely rejected the application of a proportionality analysis. In *Chee Siok Chin v Minister for Home Affairs*,[51] the applicants had been staging a protest outside a government building when they were asked by a police officer to disperse on the basis that they were causing a public nuisance contrary to the Miscellaneous Offences (Public Order and Nuisance) Act (MOA).[52] The applicants commenced proceedings in the High Court against the Minister for Home Affairs and the Commissioner of Police, asserting that, by so acting, the police officer had behaved unlawfully and/or unconstitutionally, in violation of their rights to free expression and assembly guaranteed by Articles 14(1)(a) and (b) of the Constitution. Upon the respondents' application for the proceedings to be struck out on the ground that they were, among other things, scandalous, frivolous, vexatious or otherwise an abuse of process,[53] the High Court considered whether the provisions of the MOA relied upon by the respondents to justify the police officer's actions were constitutional.[54]

50 See the text accompanying n 57, below.

51 [2006] 1 SLR(R) 582 (HC, Singapore).

52 Cap 184, 1997 Rev Ed: ibid 592, [13]. During the legal proceedings the Attorney-General, acting on the respondents' behalf, identified the relevant provisions of the Act as s 13A or s 13B, which criminalize the causing of harassment, alarm or distress to any person: ibid 605, [59].

53 ibid 589, [1].

54 ibid 599-600, [41].

The Court contrasted Article 14(2), which authorizes Parliament to impose restrictions on the rights protected by Article 14(1), with Article 19(3) of the Indian Constitution. The latter permits the state to impose 'reasonable restrictions' on the right to assemble in the interests of the sovereignty and integrity of India or public order.[55] In view of the absence of an equivalent phrase from the Singapore Constitution, the Court said that 'there can be no questioning of whether the legislation is "reasonable". The court's sole task, when a constitutional challenge is advanced, is to ascertain whether an impugned law is within the purview of any of the permissible restrictions. […] All that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution.'[56] Further, the Court noted that the phrase *necessary or expedient* appearing in Article 14(2) ('Parliament may by law impose […] such restrictions as it considers necessary or expedient in the interest of […] public order […]') conferred on Parliament 'an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution. […] The presumption of legislative constitutionality will not be lightly displaced'.[57] Since it was clear from the long title and 'contents and purport' of the MOA, and relevant parliamentary debates, that the Act was enacted to preserve public order, its constitutionality was unchallengeable.[58]

The Court also stated it was 'axiomatic that the terms and tenor' of Article 10(2) of the European Convention are 'very different' from Article 14(2) of the Singapore Constitution.[59] Another 'fundamental difference' between English law and Singapore law was the applicability of the notion of proportionality, which '*inter alia*, allows a court to examine whether legislative interference with individual rights corresponds with a pressing social need; whether it is proportionate to its legitimate aim and whether the reasons to justify the statutory interference are relevant and sufficient'. The Court then commented: 'Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.'[60]

It should be noted that these conclusions reached by the High Court were, in fact, *obiter*. The applicants submitted they were challenging the constitutionality of the manner in which the police officer had exercised his powers and not the constitutionality of the MOA.[61] They asserted that their right to free assembly entitled them to gather in a public place to conduct a protest which did not breach the peace.[62] However, rather than assess the legality of the police action with reference to Article 14, the Court applied traditional administrative law principles, ultimately finding that the police officer had not acted in a *Wednesbury*-unreasonable manner.[63] Thus, the Court is free to re-examine the reasoning in *Chee Siok Chin* in future cases.

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55 ibid 601, [45].
56 ibid 602-603, [49].
57 ibid.
58 ibid 604, [55]-[56].
59 ibid 615, [86].
60 ibid 616, [87].
61 ibid 604, [57], and 625, [117].
62 ibid 622, [107].
63 ibid 618, [93], and 628, [125].

The applicability of a proportionality analysis to Article 14 of the Constitution was also briefly considered by the High Court in a 2011 case, *Chee Soon Juan v Public Prosecutor*.[64] The appellants, having been convicted by the District Court for making public addresses without obtaining licenses under the Public Entertainments and Meetings Act,[65] submitted on appeal that, among other things, the Act was inconsistent with their right to free speech guaranteed by Article 14(1)(a). They relied on the Canadian case *Vancouver (City) v Zhang*,[66] in which the Court of Appeal of British Columbia had found a by-law banning structures encroaching on or obstructing the free use of streets inconsistent with freedom of expression which was guaranteed by section 2(b) of the Canadian Charter, as it prevented Falun Gong practitioners from placing billboards beside the street opposite the Chinese consulate.[67] The Singapore High Court found the relevant provisions of the Canadian Charter to be 'quite different' from the Singapore Constitution's provisions.[68] Section 1 of the Charter[69] requires that restrictions minimally impair rights and freedoms,[70] but under Article 14 the Singapore Parliament is authorized to impose restrictions that it considers necessary or expedient in the interest of, *inter alia*, public order, and '[u]nlike the position in Canada, there is no requirement in Singapore for such restrictions to meet the minimal impairment requirement'.[71] Though the Court only focused on one element of a proportionality analysis, it may be inferred that the Court felt that a proportionality approach is inapplicable to the Singapore Constitution due to textual differences between corresponding provisions of the Constitution and the Canadian Charter.

The Singapore courts have also not applied a proportionality analysis when dealing with cases relating to the right to freedom of religion guaranteed by Article 15 of the Constitution. The main issue in *Chan Hiang Leng Colin v Public Prosecutor*[72] was whether two pieces of subsidiary legislation that had been issued by the Government violated freedom of religion. Referred to in the judgment as 'Order 123' and 'Order 179', the first order had declared as undesirable all works produced by a named publisher of Jehovah's Witnesses material, while the second had deregistered the Singapore Congregation of Jehovah's Witnesses as a society.[73] The appellants, who were Jehovah's Witnesses, conceded that their religion prohibited them from serving in the military, which meant that male adherents could not perform compulsory national service.[74] The High Court held that it could not substitute its own view for that of the Minister for Home Affairs as to whether the Jehovah's Witnesses constituted a threat to national security. Thus, the appellants could not challenge the legality of the orders.[75] Since the Court essentially relied on a non-justiciability argument,[76] it did not have to consider whether a proportionality

64 [2011] 2 SLR 940 (HC, Singapore).
65 Cap 257, 2011 Rev Ed.
66 [2010] BCCA 450 (CA, BC, Canada).
67 *Chee Soon Juan* (n 64) 945-946, [6]-[7].
68 ibid 946, [7].
69 See the text accompanying n 2, above.
70 *Chee Soon Juan* (n 64) 946, [9], citing *Oakes* (n 4).
71 *Chee Soon Juan*, ibid 946-947, [9].
72 *Chan Hiang Leng Colin v PP* (n 14).
73 ibid 214-216, [1]-[7].
74 ibid 235, [62].
75 ibid 237-238, [68]-[70].
76 The point was more clearly expressed by the Court of Appeal in a subsequent decision, *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294, which involved an attempt to

approach applied to Article 15(4) of the Constitution which, as mentioned earlier, permits the limitation of the right to freedom of religion by enacting general laws 'relating to public order, public health or morality'.

Nonetheless, the Court addressed an argument which the appellants raised: whether there had to be a 'clear and immediate danger to public order before the right of freedom of religion could be curtailed'.[77] The phrasing of this test closely resembles the 'clear and present danger' or 'clear and imminent danger' test formerly applied to determine when the rights to freedom of speech, the press and assembly protected by the First Amendment to the United States Constitution might legitimately be restricted.[78] In any case, the judge was having none of it, holding that the test could not be applied in Singapore:

> 'It cannot be said that beliefs, especially those propagated in the name of "religion", should not be put to a stop until such a scenario exists. If not, it would in all probability be too late as the damage sought to be prevented would have transpired. In my opinion, any administration which perceives the possibility of trouble over religious beliefs and yet prefers to wait until trouble is just about to break out before taking action must be not only pathetically naive but also grossly incompetent.'[79]

The judge did not propose any alternative test with a standard more deferential to the Government, but his comments evince the view that it is inappropriate for courts to assess the reasonableness of legislation restricting freedom of religion.

The result of the Singapore courts not adopting a proportionality analysis in the Article 14 and Article 15 cases described above is that they accept legislation as constitutional if it relates to subjects the bill of rights specifies as grounds for restricting fundamental liberties, even if the legislation limits such liberties to a high degree.

III. Proportionality and Taciturn Constitutions

As we have seen, proportionality analyses have been applied by courts to bills of rights documents such as the Canadian Charter and the European Convention on Human Rights, which permit rights to be restricted only on grounds that are, for instance, 'reasonable' and 'demonstrably justified in a free and democratic society'.[80] The Singapore Constitution, however, is an exemplar of a bill of rights that is more taciturn. For instance, while Article 14(1)(b) guarantees to citizens 'the right to assemble peaceably and without arms', Article 14(2)(b) states:

> 'Parliament may by law impose […] on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order.'

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quash a third piece of subsidiary legislation, Order 405/1994, banning the works of another publisher of Jehovah's Witnesses materials: ibid 303-306, [28]-[36].

77 *Chan Hiang Leng Colin v PP* (n 14) 233-234, [59].

78 See *Schenck v United States* 249 US 47, 52 (1919) (SC, US) ('clear and present danger'), and *Abrams v United States* 250 US 616, 627 (1919) (SC, US) ('clear and imminent danger'), *per* Holmes J (dissenting). The test was later replaced by an 'incitement to imminent lawless action' test in *Brandenburg v Ohio* 395 US 444, 447 (1969) (SC, US).

79 *Chan Hiang Leng Colin v PP* (n 14) 233-234, [59].

80 Canadian Charter, s 1.

Read literally, the provision suggests that any law enacted by Parliament which is necessary or expedient in the interest of national security or public order is constitutional even if it restricts free assembly. Does the phraseology of bills of rights along the lines of Singapore's therefore effectively rule out the application of proportionality? It is submitted there are a number of reasons why what we may call the *Chee Siok Chin* approach should not be followed.

A. The Significance of Rights

First, full effect ought to be given to the use of the word *right* in the Constitution. In a 1998 High Court decision, constitutional rights were distinguished from privileges in the following manner:

> 'Constitutional rights are enjoyed because they are constitutional in nature. They are enjoyed as fundamental liberties – not stick-and-carrot privileges. To the extent that the Constitution is supreme, those rights are inalienable. Other privileges such as subsidies […] are enjoyed because the Legislature chooses to confer them – these are expressions of policy and political will.'[81]

If a 'right' can be overridden simply by the legislature enacting a restrictive measure, which is essentially what *Chee Siok Chin* suggested, then in reality it is more akin to a privilege than a right. Thus, if something is to be properly characterized as a right, with the fundamentality and inalienability that entails, the court must surely be capable of assessing whether the right has been legitimately abridged. This is where the proportionality test comes to the fore.

The preceding is buttressed by the *petitio principii* argument employed by the Privy Council in *Ong Ah Chuan v Public Prosecutor*,[82] an appeal originating from Singapore. The provision their Lordships had to examine was Article 9(1) of the Constitution which, it will be recalled, states: 'No person shall be deprived of life or personal liberty save in accordance with law.' The Public Prosecutor had argued that since Article 2(1) defines *written law* as meaning, among other things, 'all Acts […] for the time being in force in Singapore', and *law* as including 'written law', so long as a deprivation of life or liberty has been carried out in accordance with an Act passed validly by Parliament, it is constitutional 'however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be'.[83] This submission failed to impress the members of the Board, who found that it begged the question:

> 'Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of petitio principii. The definition of "written law" includes provisions of Act passed by the Parliament of Singapore only to the extent that they are "for the time being in force in Singapore"; and Art 4 provides that "any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the

81 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78, 102, [56] (HC, Singapore).
82 *Ong Ah Chuan* (n 32).
83 *Ong Ah Chuan*, ibid 721-722, [24]. The Public Prosecutor only conceded one limitation: that the Act of Parliament had to apply equally to all to avoid falling foul of the anti-discriminatory provisions of Art 12(1): ibid.

> inconsistency, be void". So the use of the expression "law" in Arts 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after 16 September 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.'[84]

Similarly, it is submitted that the statement in Article 14(2)(b) that 'Parliament may by *law* impose […] restrictions as it considers necessary or expedient' places on courts the responsibility of determining whether the law in question is a reasonable and proportionate restriction on the right to assemble peaceably, and cannot be read as *carte blanche* for Parliament to impose any sort of arbitrary restriction.

Remarks made by the Court of Appeal in a 2010 case hint that the Court might be inclined to take a different view of what a right entails. In *Review Publishing Co Ltd v Lee Hsien Loong*,[85] the Court held that the defence of responsible journalism propounded by the House of Lords in *Reynolds v Times Newspapers Ltd*[86] is not part of the common law of Singapore and thus cannot be relied on as a defence to a defamation claim. It was unnecessary for the Court to decide if the constitutional right to free speech required the adoption of the *Reynolds* privilege since Article 14(1)(a) of the Constitution applies only to Singapore citizens, which the appellants were not. Nonetheless, in an extended *obiter* statement, the Court set out various considerations that would have to be taken into account in future. In particular, it identified a number of ways in which freedom of speech and protection of reputation can be conceived in relation to each other. First, free speech can be regarded as a 'preferential right' taking precedence over protection of reputation, but capable of being outweighed in some situations – for instance, if the responsible journalism test is not satisfied. Secondly, free speech can be treated as a 'fundamental right' trumping protection of reputation except in limited circumstances, such as the malicious publication of a defamatory statement by the defendant.[87] In the Court's opinion, though, the right to free speech in the Constitution is a 'subsidiary right' since Parliament is authorized by Article 14(2)(a) to impose restrictions on it.[88]

This view is correct only if the courts have no role in evaluating the fairness of Acts of Parliament, and, it is submitted, does not give proper weight to the concept of a right in the Constitution. If a right is fundamental and inalienable, it should only be limitable in narrowly defined situations which may be discerned through a proportionality analysis. We detract from the notion of a right if we permit it to be overridden too easily – perhaps a potential danger of the 'preferential right' approach.

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84 ibid 722, [25].

85 [2010] 1 SLR 52 (CA, Singapore).

86 [1999] UKHL 45, [2001] 2 AC 127.

87 *Review Publishing* (n 85) 184, [287]-[288]. The Court of Appeal also noted (ibid 184, [289]) that free speech and protection of reputation can be 'co-equal rights', with the implication that the former does not enjoy any presumptive primacy over the latter. It felt that this was the position under the European Convention on Human Rights because reputation is protected by Article 8 of the Convention as an aspect of the right to private and family life while freedom of speech is protected by Article 10. By stating it was mentioning this point '[f]or completeness', the Court appeared to be suggesting that the co-equal rights approach is inapplicable to Singapore. The right to privacy is not expressly mentioned in the Singapore Constitution.

88 *Review Publishing*, ibid 183-184, [286].

B. Treatment of Citizens and Non-citizens

It was mentioned earlier that a number of the fundamental liberties in the Constitution, including the rights to freedom of speech, assembly and association in Article 14, are only enjoyed by Singapore citizens.[89] Thus, in *Review Publishing*, the Court of Appeal held that only Singapore citizens enjoy constitutional free speech, whereas non-citizens 'enjoy only common law free speech'.[90] It would be natural to assume that since citizens have a constitutionally protected right to freedom of speech and expression, this right can only be restricted by Parliament for strong reasons and as minimally as possible. On the other hand, Parliament has a freer hand in enacting legislation that limits the common law right of free speech enjoyed by non-citizens.

However, a consequence of the *Chee Siok Chin* approach is that since the courts do not scrutinize the reasonableness of a legislative restriction once it is found to fall within one the enumerated grounds in, say, Article 14(2)(a), it is as easy for Parliament to restrict citizens' constitutional right of free speech as it is to curtail non-citizens' common law free speech. Thus, when a proportionality analysis is not applied, the reservation of free speech, assembly and association rights to citizens is effectively meaningless, since citizens enjoy no greater rights than non-citizens in this respect.

C. Avoidance of Arbitrariness

In a number of Singapore cases judges have asserted it is their duty to gauge whether the executive and legislative branches of government have acted arbitrarily. *Chng Suan Tze v Minister for Home Affairs*[91] involved a challenge to detentions without trial under the Internal Security Act (ISA).[92] The Court of Appeal accepted the appellants' argument that Article 12(1) of the Constitution, which guarantees to every person equality before the law and equal protection of the law, requires Parliament's legislative powers not to be 'exercised in a manner which authorises or requires the exercise of arbitrary power, or the exercise of power in breach of fundamental rules of natural justice'.[93] Further, since Article 93 vests judicial power in the courts, it is for them to determine whether Parliament has exercised its discretion properly.[94] As the Court put it: '[T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.'[95]

Chan Sek Keong J, who subsequently served as Chief Justice of Singapore between 2006 and 2012, was one of the three judges contributing to the *Chng Suan Tze* decision. Sitting in the High Court later on, he reiterated the point made there in *Jeyaretnam v Public Prosecutor*,[96] holding that if a statute vested absolute and untrammelled discretion

89 See the text accompanying n 49, above.
90 *Review Publishing* (n 85) 171, [257].
91 [1988] 2 SLR(R) 525 (CA, Singapore).
92 Cap 143, 1985 Rev Ed.
93 *Chng Suan Tze* (n 91) 551-552, [79] and [82], applied in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, 313, [149] (HC, Singapore), and *Yong Vui Kong v AG* (n 12) 1233-1234, [78]-[80].
94 *Chng Suan Tze*, ibid.
95 ibid 553, [86].
96 [1989] 2 SLR(R) 419 (HC, Singapore).

in a public official to deny a citizen a licence to hold a public event, this would be an unconstitutional deprivation of the citizen's right to freedom of speech and expression.[97] He found the tests for constitutionality expressed in *Indulal v State of Gujarat*[98] and *Francis v Chief of Police*[99] – that legislation must provide adequate guidelines for the exercise of power, and that public officials must exercise power in accordance with legislative policy and not for extraneous considerations[100] – applicable to the Singapore Constitution, even though Article 19 of the Indian Constitution and section 10 of the Constitution of St Christopher, Nevis and Anguilla, respectively the provisions in point in those cases, permitted 'reasonable' restrictions on the right to free speech.[101]

Afterwards, when delivering the judgment of the Court of Appeal in *Yong Vui Kong v Public Prosecutor*, Chan CJ expressed the view that legislation 'of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties' would be unconstitutional.[102]

The courts have thus abhorred the arbitrary and unlimited exercise of executive and legislative powers, and consequently have asserted a jurisdiction to invalidate the actions of public authorities and laws having this effect. Such reasoning must also apply when judges are required to assess the constitutionality of legislation restricting fundamental liberties.

D. Originalist Arguments

In *Yong Vui Kong v Public Prosecutor*, the Court of Appeal applied an originalist approach when interpreting the Constitution. The 1966 Constitutional Commission chaired by the then Chief Justice Wee Chong Jin,[103] which had been appointed to formulate constitutional safeguards for multiracialism and equality of all citizens,[104] had suggested the introduction of an express prohibition of torture and inhuman punishment. The Court held that since Parliament had not included a provision to this effect when it amended the Constitution in 1969 to implement the Commission's proposals, such a provision could not be inferred into Article 9 as Parliament had essentially rejected it.[105]

Is taking a proportionality approach to a clause such as Article 14 excluded by a similar originalist argument? The bill of rights in Singapore's Constitution was derived from the fundamental liberties in the Federal Constitution of Malaysia. Malaysia itself had received them in a new constitution upon its independence from Great Britain in 1957. In February that year, a draft constitution with copious borrowings from the Indian Con-

97 ibid 429, [27].
98 AIR 1963 Guj 259 (HC, Gujarat, India).
99 [1973] UKPC 4, [1973] AC 761, 772-773 (PC on appeal from St Christopher, Nevis and Anguilla).
100 *Jeyaretnam* (n 96) 429-431, [28]-[30].
101 ibid 431, [31].
102 *Yong Vui Kong v PP* (n 31) 500, [16].
103 *Report of the Constitutional Commission, 1966* (chairman: Wee Chong Jin CJ) (Government Printer 1966), reproduced in Kevin Y L Tan and Thio Li-ann, *Tan, Yeo & Lee's Constitutional Law in Malaysia and Singapore* (2nd edn, Butterworths Asia 1997) Appendix D.
104 *Report of the Constitutional Commission, 1966*, ibid 1, [1].
105 *Yong Vui Kong v PP* (n 31) 520-521 and 523-524, [64]-[65] and [71]-[72]. For commentary on this case, see Jack Tsen-Ta Lee, 'The Mandatory Death Penalty and a Sparsely Worded Constitution' (2011) 127 L Q Rev 192.

stitution[106] was drawn up and submitted together with a report to Her Britannic Majesty and their Highnesses the Rulers of the Malay States by a Constitutional Commission under the chairmanship of Lord Reid, a member of Judicial Committee of the House of Lords.[107] Article 10(1) of the draft constitution stated:

> 'Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restriction imposed by federal law in the interest of the security of the Federation, public order, or morality, or in relation to contempt of court, defamation, or incitement to any offence. [Emphasis added]'

While a majority of the Commission members did not comment specifically about the drafting of this clause, Abdul Hamid J made the following statement in a separate 'note of dissent':

> 'Article 10. The word "reasonable" wherever it occurs before the word "restrictions" in the three sub-clauses of this article should be omitted. Right to freedom of speech, assembly and association has been guaranteed subject to restrictions which may be imposed in the interest of security of the country, public order and morality. If the Legislature imposes any restrictions in the interests of the aforesaid matters, considering these restrictions to be reasonable, that legislation should not be challengeable in a court on the ground that the restrictions are not reasonable. The Legislature alone should be the judge of what is reasonable under the circumstances. If the word "reasonable" is allowed to stand every legislation on this subject will be challengeable in court on the ground that the restrictions imposed by the Legislature are not reasonable. This will in many cases give rise to conflict between the views of the Legislature and the views of the court on the reasonableness of the restrictions. To avoid a situation like this it is better to make the Legislature the judge of the reasonableness of the restrictions. If this is not done, the Legislatures of the country will not be sure of the fate of the law which they will enact. There will always be a fear that the court may hold the restrictions imposed by it to be unreasonable. The laws would be lacking in certainty.'[108]

The report and draft constitution were studied by the British Government as well as by a Working Party in the Federation of Malaya, consisting of the High Commissioner, four representatives of the Rulers of the Malay States, four representatives of the Federation Government, the Chief Secretary and the Attorney-General. Between 13 and 21 May 1957, a delegation of the Working Party met British Government representatives in London and reached agreement on all points of principle.[109] In the meantime, the draft constitution was reviewed by the Office of the Parliamentary Counsel in the United Kingdom 'with a view to removing ambiguities and inconsistencies and, where necessary, improving its form', taking into consideration recommendations of the Working Party.[110] The

106 R H Hickling, *Malaysian Public Law* (Pelanduk Publications 1997) 15.
107 See the *Report of the Federation of Malaya Constitutional Commission* (chairman: Lord Reid) (HMSO 1957) Appendix II. The report, but not its appendices, is reproduced as Appendix A of Tan and Thio (2nd edn) (n 103).
108 ibid 101, [13(ii)], cited in Tan and Thio (2nd edn), ibid 983.
109 *Federation of Malaya Constitutional Proposals (Federation of Malaya White Paper No 41 of 1957)* (Printed at the Government Press by G A Smith, Government Printer 1957) 1, [1]-[2].
110 ibid 1-2, [3].

revised draft was then examined again at meetings of the Working Party in Malaya at which United Kingdom officials were present.[111] Article 10 of the finalized draft,[112] which was eventually enacted into law, now reads:

> '10. (1) Subject to Clause (2) —
> (a) every citizen has the right to freedom of speech and expression; […]
> (2) *Parliament may by law impose* —
> (a) *on the rights conferred by paragraph (a) of Clause (1)*, such restrictions as it deems necessary or expedient in the interest of the security of the Federation, friendly relations with other countries, public order or morality and *restrictions* designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; […] [Emphasis added.]'

It is not clear why the word *reasonable* was removed from the draft constitution prepared by the Reid Commission. A white paper issued by the Federation Government merely said: 'It has been agreed that the Federal Constitution should define and guarantee certain fundamental rights, and it is proposed to accept the principles recommended by the Commission for inclusion in Part II of the Federal Constitution although there have been some changes in drafting'.[113] Debates in the Federation legislature shed little light on the intended meaning or scope of provisions of the bill of rights:

> 'As contemporary evidence of the meanings of controversial provisions the debates on the Constitution in the Legislative Council [of the Federation of Malaya] are not too helpful […] No real discussion was had of its provisions. The Chief Minister restated some of them; but members were generally keenly conscious of the fact that they were expected to act favourably and quickly on the Constitution as a whole. Indeed, any desire to delay impending Merdeka[114] by constitutional controversy was pointedly eschewed by more than one speaker, most of whom rose simply to defend, or occasionally attack, not to debate or expound or clarify any section of, the Constitution. Many took the floor for the sole purpose of congratulating the Chief Minister.'[115]

Following Singapore's own independence from Malaysia in 1965, the Wee Constitutional Commission generally approved the fundamental liberties imported from the Malaysian Constitution without detailed discussion of them. The Singapore Government made known its views on the report in Parliament on 21 December 1966 and legislative debates were held in March 1967. Neither the Wee Commission report nor the subse-

111 ibid 2, [3].

112 *Proposed Constitution of Federation of Malaya* (Printed at the Government Press by G A Smith, Government Printer 1957) 4.

113 *Federation of Malaya Constitutional Proposals* (n 109) 17, [53]. Hugh Hickling (n 106) 16, has commented: '[T]he Reid Commission's proposal that freedom of speech should be subject to "reasonable restriction" by federal law was abandoned, since the use of the word "reasonable" would presumably have permitted (or compelled) the courts to substitute their own tests in lieu of those provided by written law.' This, however, is speculation.

114 *Merdeka* is a Malay word meaning 'independence'. Used in this context, it refers to the independence of the Federation of Malaya – now the Federation of Malaysia – from the United Kingdom on 31 August 1957, now celebrated as Merdeka Day.

115 Harry E Groves, 'Fundamental Liberties in the Constitution of the Federation of Malaya – A Comparative Study' (1959) 5 Howard LJ 190, 214.

quent Parliamentary debates on it provide assistance as to how Article 14(2)(a) of the Singapore Constitution should be interpreted.

In the circumstances, it is submitted there is a distinct lack of evidence as to why the word *reasonable* was omitted from the Malaysian predecessor of Article 14(2)(a). We do not know if Abdul Hamid J's minority view in the Reid Constitutional Commission was found convincing by the framers of the Federal Constitution. In any case, it is doubtful that his view ought to be attributed to the legislators in the post-independence Parliament of Singapore who decided the provisions of the Singapore Constitution, since it was not expressly adverted to.

Indeed, when determining the constitutionality of legislation, the Malaysian courts themselves have not regarded the legislative materials examined above as mandating them to avoid assessing its reasonableness. In *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia*,[116] the Court of Appeal declined to give the bill of rights in the Constitution a 'literal meaning', deciding instead that the word *reasonable* should be read into Article 10(2)(b), thus permitting Parliament to impose only reasonable restrictions on the right to freedom of assembly. The Court held that this conclusion was, in part, demanded by the equality guarantee in Article 8(1) [Singapore's Article 12(1)], which required that 'not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved'.[117] The approach taken by *Mohd Nasir* was approved by the Federal Court, Malaysia's highest court, in *Sivarasa Rasiah v Badan Peguam Malaysia*.[118]

The fundamental liberties in a constitution should be interpreted generously[119] and not in a manner that curtails rights unless the legislature has unambiguously expressed its intention to do so.[120] Thus, it cannot conclusively be said that Parliament did not intend to confer on the courts the discretion to consider the rationality of statutory restrictions on free speech, even if they fall within the exceptions set out in Article 14(2)(a). Another way of interpreting the Article, which is more consonant with the right to freedom of speech, is that the Constitution's framers found it unnecessary to state that limitations imposed on the right had to be reasonable since it is inherent in rights interpretation that the judiciary must assess the reasonableness of such limitations.[121]

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116 [2006] 6 MLJ 213 (CA, Malaysia).

117 ibid 219-220, [7]-[9].

118 [2010] 2 MLJ 333, 340, [5] (FC, Malaysia).

119 '[T]heir Lordships would give to Pt IV of the Singapore Constitution [which contains the bill of rights] "a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the [fundamental liberties] referred to"'. *Ong Ah Chuan* (n 32) 721, [23], citing *Minister of Home Affairs v Fisher* [1979] UKPC 21, [1980] AC 319, 328 (PC on appeal from Bermuda).

120 See, for instance, *Morguard Properties Ltd v City of Winnipeg* (1983) 3 DLR (4th) 1, 13 (SC, Canada); *Wheeler v Leicester City Council* [1985] UKHL 6, [1985] AC 1054, 1065; and *Coco v The Queen* (1994) 179 CLR 427, 437 (HC, Australia).

121 See Michael Hor and Collin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore' (1991) 12 Sing L Rev 296, 298; Michael Hor, 'The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*' [1992] Sing J Legal Studies 542, 544-549, particularly 547: '[…] Art. 14 expresses a basic commitment to the freedom of speech. Parliament is, however, given the power to derogate from this in the interest of the exceptions mentioned. It must be implicit that the power of derogation cannot be so broad as to eclipse the basic commitment to free speech altogether. The Court must have the supervisory duty to see that such derogations do not get out of hand. It has the constitutional role of ensuring that the balance of free speech and, say, the protection of reputation is kept.'

It is evident from these judicial pronouncements that, notwithstanding the taciturnity of the Constitution, the courts do accept they have the responsibility of determining whether legislation is in fact absurd or arbitrary. It is submitted that the adoption of a proportionality analysis enables the courts to do just that. Conversely, if judges decline to assess the fairness or reasonableness of legislation, this permits Parliament to enact legislation that is arbitrary or disproportionate.

IV. Perceived Difficulties with Proportionality

Despite the foregoing, it might be said that courts ought not to use a proportionality analysis when interpreting fundamental liberties because it is too uncertain a test, and allows judges too much discretion to decide cases according to their personal predilections.[122] It is also said that there is a risk of inconsistency when similar cases are decided by different judges. Moreover, there is a danger that requiring judges to weigh the interests promoted by fundamental liberties against other public interests may devalue rights.

These objections to proportionality stem from disquiet with the concept of balancing. Proportionality and the concept of balancing are intimately related but not coterminous. Balancing has been described as the process of analysing a constitutional issue by identifying the interests implicated by the case and reaching a decision by explicitly or implicitly assigning values to the interests.[123] A proportionality analysis differs from mere balancing in that the former requires a judge to assess whether there is legal authorization for a restrictive measure, and its suitability and necessity. On the other hand, the fourth stage of proportionality analysis clearly involves a balancing exercise. The implication is that problems said to be associated with balancing affect proportionality as well.

A. Incommensurability

For two or more things to compared to each other, it is generally thought necessary that they are commensurable. In other words, they must be capable of being valued with some common yardstick or in some common currency. Commensurability is a key reason why the invention of money was such a groundbreaking innovation. Suppose I grow pineapples while my neighbour Ivy weaves cotton cloth. I would like to obtain fabric, and similarly Ivy would like some of my fruit. It is not impossible for us to agree on how many pineapples a yard of cloth is worth, for that is how bartering works. Nonetheless, if there exists a common currency which makes it possible for us to determine that a pineapple is worth a dollar and one yard of cloth two dollars, then it becomes easy to determine that I must give Ivy two pineapples for every yard of cloth she provides, and that one yard of cloth is more valuable than one pineapple.

It is said that one difficulty with balancing, and hence proportionality, is how to find a common currency with which to value the competing interests that arise in constitutional adjudication. The scale has to be objective and external to the judge, otherwise it may simply reflect his or her personal preferences on the matter. Unfortunately, what often happens in practice is that judges talk in terms of balancing the costs and benefits

122 It will be recalled that in *Yong Vui Kong v PP* (n 31), the Court of Appeal declined to apply a 'fair, just and reasonable procedure' test to Art 9(1) for this reason: see the text accompanying nn 29-33, above.

123 T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943, 945.

of interests at stake, but in reality do not disclose the scale they are using, how the scale is determined, or how the interests are weighted and balanced against each other.[124] For instance, in *Attorney-General v Wain*[125] the issue arising was whether the offence of scandalizing the court, a species of contempt of court, was a proper restriction upon the freedom of speech and expression guaranteed by Article 14(1)(a) of the Singapore Constitution. The High Court accepted 'that this court has duty to uphold the right to freedom of speech and expression, and […] that this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the courts'. However, without explaining how it was carrying out the balancing exercise, it went on to dismiss the submission that the public interest in protecting the courts' integrity should prevail only in cases involving dishonest or false criticism and where there existed a real and present danger to the administration of justice.[126] The judge also said the 'short answer' to the respondents' reliance on Article 14(1)(a) was Article 14(2)(a), which reads: 'Parliament may by law impose […] on the rights conferred by clause (1)(a) […] restrictions […] to provide against contempt of court […]'.[127]

Some of the best legal minds have been brought to bear on this issue, but not without cogent criticism. Robert Alexy focuses on the 'concrete weights' of principles, and expresses preference for a 'triadic' scale – light, moderate and serious – for measuring the intensity of both a statute's interference with a constitutional right, and the importance of satisfying a competing non-constitutional principle.[128] If the interference with a constitutional right is deemed by the judge to be 'serious' but the importance of satisfying a competing principle 'not important', then the restrictive measure is disproportionate and unconstitutional. Conversely, if the measure interferes with a constitutional right in a 'moderate' manner but the necessity of satisfying a competing principle is 'very important', the measure is proportionate and constitutional. In a 'stalemate situation'[129] where the interference with a constitutional right and the importance of a competing principle are of equal importance, Alexy does not accord the constitutional right any priority but submits that since neither enacting or not enacting the measure violates the proportionality principle, the court should defer to the legislature on the wisdom of the measure.[130] The importance of rights and competing interests should be assessed in relation to the constitution, which provides 'a common point of view'.[131] However, Grégoire Webber is not convinced. He points out that unless the constitution provides guidance on how to determine degrees of interference, it is unclear how any recourse to it assists a judge. Furthermore, what is to say that a light interference with a constitutional right is to be regarded as of equal weight to a competing principle of low importance?[132] Alexy's tri-

124 ibid 972–976.
125 [1991] 1 SLR(R) 85 (HC, Singapore).
126 ibid 101, [56].
127 ibid 102, [59].
128 Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002) 402 and 408, n 64, cited in Grégoire C N Webber, 'Proportionality, Balancing and the Cult of Constitutional Rights Scholarship' (2010) 23 Can J L & Juris 179, 182-184. Alexy's triadic model is based on jurisprudence of the Federal Constitutional Court of Germany: Webber, ibid 182.
129 Alexy, ibid 410-411.
130 Webber (n 128) 184.
131 Robert Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 Ratio Iuris 433, 442, cited in Webber, ibid.
132 Webber, ibid 195.

adic model therefore does not really assist much in the identification of a common currency with which to balance competing interests.

However, too much is made of the necessity to value interests in terms of a common yardstick. For one thing, different yardsticks may be applicable to the same constitutional issue for different purposes. A court should, for instance, consider if the interests proffered to it by the parties are accurately or inaccurately expressed, if they are logical or illogical, if they are relevant or irrelevant to the issue, and so on.[133] The crux of the matter, though, is how the court is to assess the relative strengths of the competing interests. Here it is important to recognize that the balancing task involves evaluating arguments of morality and policy, and thus cannot be carried out with mathematical precision in the way pineapples and cotton can be valued in monetary terms. As Webber puts it:

> 'To weigh or balance reasons may involve an examination of the advantages and disadvantages of available alternatives, but this is not to devise a common scale of evaluation, to assign a value, and to weigh in the technical sense. Rather, in holding the relevant reasons in one's mind, one proceeds according to the reason that is, in one's judgment, the most compelling and – in colloquial terms – one identifies that reason as the "weightier" one.'[134]

This is a point recognized by David Beatty: 'Whether someone's rights have been violated in law is not computed by some utilitarian, mathematical calculation. It is not about adding and subtracting people's preferences. Nor is it a process in which factors are catalogued and quantified and balanced against each other.'[135] Instead, he proposes that judges should focus on the facts of cases[136] and 'assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most',[137] such perspectives to be drawn from the parties to the proceedings and not the judges' personal views.[138] The parties' perspectives are to be assessed against objective indicia. Where applicants are concerned, these indicia include how important the impugned governmental action is to their 'larger life stories' in contrast to its benefits in others' lives.[139] As for the government, it is relevant to consider whether the rights-limiting measure has been enforced with the same rigour in comparable contexts.[140] By adopting a party-based perspective, Beatty reasons, judges are able to assess issues objectively and neutrally without relying on any particular philosophy or moral vision.[141] Nonetheless, exaggerated claims by par-

133 John Finnis, 'Commensuration and Public Reason' in Ruth Chang (ed), *Incommensurability, Incompatibility, and Practical Reason* (Harvard University Press 1997) 217, cited in Webber, ibid 198.
134 Webber, ibid 197.
135 David M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 171.
136 'Facts have a certainty, predictability, and reality about them that allows for more precise measurement and analysis. Factual claims can be tested for how accurately they conform to an independent empirical world, as it actually exists.' Beatty, ibid 73.
137 Beatty, ibid 160.
138 ibid 116, cited in Vicki C Jackson, 'Being Proportional about Proportionality: The Ultimate Rule of Law. By David M Beatty. New York: Oxford University Press. 2004' [review article] (2004) 21 Const Comment 803, 811.
139 Beatty, ibid 73.
140 Compare Beatty, ibid 66-67, cited in Jackson (n 138) 811.
141 Beatty, ibid 168.

ties are justifiably rejected, so courts must assess for themselves how significant the measure is to the parties.[142]

Beatty's arguments are not without difficulty. For one thing, he overstates the neutrality of his approach. Some element of subjectivity is inevitably involved when a judge determines if a party's claims should be regarded as overblown, and the importance placed by the parties on the impact a legislative measure has on them. It is unlikely that the parties who benefit least and most from an impugned measure will always happen to be before the court, which means that in order to apply Beatty's approach the court will have to engage in a degree of theorizing rather than merely considering the facts presented by the parties.[143] Despite this, it is submitted Beatty's views support the point that a proportionality analysis simply cannot be treated as a mechanistic act of measuring up costs and benefits.

However, does our admission that arguments of morality and policy are not commensurable in the way apples and oranges are mean that proportionality is a recipe for inconsistencies between cases since judges are essentially to rely on their intuition and personal preferences?[144] Not necessarily so. Over time, as judges applying proportionality analyses draw analogies from past cases and a stock of precedents is built up, it is likely that more 'constraining and categorical' rules will emerge.[145] Here is an example. Suppose that Parliament enacts a law making it a crime to protest within a certain distance from Parliament House without a permit, which is scarcely if ever issued. Such a statute usually does not state how much weight a court should give to the competing interests of protecting the safety of legislators and Parliament property on the one hand, and freedom of expression and assembly on the other. Taking a proportionality approach, the court will have to identify the relevant competing interests of the parties and decide which are more important. Let us say the court finds it imperative that people should be free to gather and express political opinions near the seat of the state's primary policy-making body, and strikes down the law. It would thus have laid down a rule concerning the importance to be given to freedom of expression and assembly in the context of political communication which will be applied in subsequent comparable cases.[146]

It seems somewhat glib for Beatty to say that '[j]udges who let the facts – and the parties – speak for themselves usually have no problem identifying whose interests are paramount in any individual case. Judges know just by looking, just by sight, […] even when precise calibrations are hard to provide.'[147] Ultimately judges have to lay all the relevant arguments on the table and decide which ones are weightier – more serious – and so deserve to prevail. This is no easy task, but once we accept that a degree of subjectivity is an unavoidable aspect of judicial reasoning present in many contexts, for example, when deciding whether it is fair, just and reasonable to impose tort liability, and

142 Beatty, ibid 160.

143 Webber (n 128) 188-189; Jackson (n 138) 820-825.

144 Jackson, ibid 836: 'Case-by-case application of proportionality analysis, it might be argued, virtually invites ad hoc exercises of the judge's own intuitions.'

145 ibid 838. Later on the same page, Jackson continues: '[P]roportionality analysis, if focused on a broader array of facts and institutional contexts, might lead either to the adoption of a more formal rule or a more contextualized standard.'

146 The example is adapted from one provided by Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 Melb U L Rev 668, 702-705.

147 Beatty (n 135) 73, citing *Jacobellis v Ohio* 378 US 184 (1964) (SC, US).

whether punishment fits the crime, the balancing of competing interests in constitutional cases is perhaps not vastly different.

B. Devaluation of Rights

Another difficulty with proportionality is that it is said to devalue rights. This is reflected to some extent in the writings of Alexy and Beatty – for instance, Beatty regards proportionality as '[making] the concept of rights almost irrelevant'[148] while Alexy regards rights as no more than 'prima facie requirements'.[149] Essentially, the problem lies in the 'cost' of restricting a right being seen as a mere interest capable of being outweighed by the benefit of an opposing interest which the limiting legislation or administrative decision promotes.[150] Related to this is the criticism that the balancing engaged in by the court is essentially what legislators do before they vote to enact legislation, so there is little reason for the court to depart from the balance already struck by the legislature.[151] Indeed, it has been suggested that proportionality analysis is best regarded as enabling the political branches of government to play a role in determining whether rights should be limited, and therefore courts should adopt a standard that is 'relatively deferential to the necessary legislative judgment. […] [T]he question reviewing courts should ask is whether the legislative judgment that the constitutional criteria for an override have been satisfied in the particular context is a reasonable one, and not whether the judges agree with it.'[152] Thus, a court should not judge a limiting measure directly, but 'at one remove',[153] that is, it should consider whether it was reasonable for the legislature to have enacted the measure, and not whether the measure is itself reasonable.[154]

It is submitted, though, that when engaging in proportionality analysis in the course of constitutional construction, courts are not simply repeating a task best left to the legislature but fulfilling a crucial, independent function. The presence of a bill of rights implies that courts act as scrutineers, ensuring that proper regard has been given to fundamental rights when the restrictive measure was made. Because of their structural independence from the political branches, they are the appropriate branch of government to safeguard rights, particularly those asserted by minorities and unpopular groups.[155] This being the case, when applying a proportionality approach, judges should not be constrained to show deference to the prior choices of the political branches, but ought to carry out a full evaluation of whether the restrictive measure in question infringes rights to an unacceptable extent. With respect, the suggestion that courts should judge restric-

148 Beatty, ibid 160.
149 Alexy (n 128) 57.
150 Webber (n 128) 198, who calls this '[doing] violence to the idea of a constitution'. See also Aleinikoff (n 123) 986-987, noting that Ronald Dworkin has argued that 'viewing constitutional rights simply as "interests" that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a "right"'. Aleinikoff, ibid 987, citing Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 194 and 269.
151 Aleinikoff, ibid 984.
152 Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 L & Ethics of Hum Rts 78, 99.
153 ibid 103, citing *United States v Lopez* 514 US 549 at 616 (1995) (SC, US), *per* Breyer J (dissenting).
154 Gardbaum, ibid 103-104.
155 Aleinikoff (n 123) 984-986.

tive measures 'at one remove' sounds very much like *Wednesbury* unreasonableness, which is not an appropriate standard for rights adjudication.

To guard against inadvertent devaluation of rights, then, it is submitted that courts must give presumptively stronger weight to the interests sought to be protected by fundamental rights. This can be seen as one of the consequences of the presumption in favour of generosity that is generally accorded to bills of rights. Indeed, the third stage of the proportionality test seeks to achieve this. The test of necessity, by which a restrictive measure must be found to infringe rights as minimally as possible, requires judges to ensure that rights are not outweighed by any measure that may be characterized as 'reasonable'. However, there is a sound argument that when applying the necessity test courts should not insist that there is only one possible 'least restrictive' way of limiting a right, but accord some degree of deference to the executive or legislative body that introduced the measure because 'a judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down'.[156] Peter Hogg has expressed the view that permitting such a 'margin of appreciation' is required because judges may be 'unaware of the practicalities of designing and administering a regulatory regime, and are indifferent to considerations of cost'.[157] Thus, the stage three test is arguably better expressed as requiring a measure to restrict rights 'as little as is *reasonably* possible'.[158] To enable courts to apply the necessity test properly, it is for the parties praying that the restrictive measure should be upheld to adduce evidence showing that any scheme limiting rights less would be administratively unworkable or costly to an unacceptable degree.

By the same token, to resist devaluing rights, when applying the fourth stage of a proportionality analysis – that is, when determining overall whether the benefits of a restrictive measure outweigh the costs of curtailing rights – courts must likewise start from the point that the measure is seeking to limit a fundamental right, which must be vindicated unless substantial contrary reasons have been given. Again, it is submitted that this is a natural consequence of the presumption in favour of generosity. It is also worth noting that proportionality in the narrow sense embodied in the fourth stage of the analysis is a tool enabling the court to weigh up the costs and benefits of rights-limiting legislation in a nuanced manner, taking into account the local context. Judges in different jurisdictions dealing with similar factual scenarios may well reach divergent conclusions.

V. Concluding Thoughts

While the manner of applying a proportionality analysis in rights adjudication differs among jurisdictions, four steps are typically involved: (1) a determination that the government has legal authority to enact the restrictive measure in question; (2) a suitability test that establishes whether the means adopted in the measure and the policy objectives of the measure are linked by a rational relationship; (3) a necessity test that requires the

156 *Illinois Elections Board v Socialist Workers Party* 440 US 173 (1979) (SC, US), 188-189 *per* Blackmun J, cited in Peter W Hogg, *Constitutional Law of Canada* (5th edn, Thomson Carswell 2007) vol 2, 148, § 38.11(b).

157 Hogg, ibid.

158 *R v Edward Books and Art Ltd* [1986] 2 SCR 713, 772 (SC, Canada) *per* Dickson CJ.

measure to restrict rights as minimally as is reasonably possible in the circumstances; and (4) a balancing exercise in which the benefits of the restrictive measure are compared against the costs arising from the curtailment of rights. It is true that Singapore courts have not applied this complete four-stage proportionality analysis. However, the individual elements of the analysis are not foreign to constitutional interpretation in Singapore.

Stage 2 of the analysis requires a court to determine if there is a rational relation between the restrictive measure laid down by Parliament and the policy objectives that are sought to be achieved through the measure. This is identical to the key element of the 'rational classification test' that features in the jurisprudence of the Singapore courts concerning Article 12(1) of the Constitution. In *Yong Vui Kong v Public Prosecutor*, the Court of Appeal said that a differentiating measure prescribed by legislation is only consistent with Article 12(1) if the classification underlying the measure is founded on an intelligible differentia, and if the differentia bears a rational relation to the object sought to be achieved by the law in which the classification is employed.[159] This test is similar to the rational basis review applied to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[160] The minimal impairment of rights requirement in Stage 3 finds expression in, among others, the *Chng Suan Tze* case, the Court of Appeal holding that since sections 8 and 10 of the ISA are exceptions to the fundamental liberties guaranteed by Articles 9, 13 and 14 of the Constitution, they 'should therefore be narrowly construed so as to derogate as little as possible from such fundamental liberties'.[161]

As for Stage 4, Singapore courts have on numerous occasions emphasized the need to balance fundamental rights against competing interests.[162] Yet, there is scant evidence in the cases that the courts meaningfully carry out the balancing by examining if the rights in issue have been justifiably displaced by proportionate measures. A position sometimes taken is that the balancing has already been carried out by Parliament and finds expression in provisions like Articles 14(2) and 15(4) that authorize Parliament to impose restrictions on rights in whatever manner they wish, and that it is not for the courts to engage in a separate balancing assessment. *Chee Soon Juan v Public Prosecutor*[163] is illustrative of this mindset. The High Court said that freedom of speech is not an absolute right in any society, democratic or otherwise, and that '[b]roader societal concerns such as public peace and order must be engaged in a balancing exercise with the enjoyment of this personal liberty. *This is embodied in art 14(2)(a)*.'[164] This approach

159 *Yong Vui Kong v PP* (n 31) 536, [109], cited in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476, 525, [124] (CA, Singapore), and in *Lim Meng Suang* (n 15) 126, [18]. See also *Taw Cheng Kong* (CA) (n 14) 507-508, [58].

160 See, for instance, *City of Cleburne v Cleburne Living Center, Inc* 473 US 432, 440 (1985) (SC, US): 'The general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'

161 *Chng Suan Tze* (n 91) 551, [79], citing *Liew Sai Wah v Public Prosecutor* [1968-1970] SLR(R) 8, 11, [11]–[12] (PC on appeal from Singapore), and *Ong Ah Chuan* (n 32) 721, [23].

162 See, for instance, *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 1 SLR(R) 709, 732, [46] (HC, Singapore); *Wain* (n 125) 101, [56]; *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791, 817-818, [61] (CA, Singapore); *Jasbir Singh v Public Prosecutor* [1994] 1 SLR(R) 782, 799, [46] (CA, Singapore); *Chan Hiang Leng Colin* (n 72) 235, [64]; *Attorney-General v Lingle* [1995] 1 SLR(R) 199, 203-204, [11] (HC, Singapore); *Chee Siok Chin* (n 51) 619, [96]; *Review Publishing Co Ltd v Lee Hsien Loong* (n 85) 176-179, [267]-[274]; and *Attorney-General v Shadrake* [2011] 2 SLR 445, 474, [56]-[57] (HC, Singapore).

163 [2003] 2 SLR(R) 445 (HC, Singapore).

164 ibid 450, [20] (emphasis added).

seems out of line with the cases stating that the courts must guard against arbitrariness in lawmaking,[165] and clearly acts as a severe self-restriction on the role played by the courts in constitutional adjudication. Nevertheless, it is heartening that in *Review Publishing* the Court of Appeal accepted that judges may have to strike a different balance between protecting fundamental liberties and upholding other public interests.[166]

Essentially, all the strands of a proportionality analysis are already present in Singapore jurisprudence to varying degrees. What I have attempted to do in this paper is to justify why Singapore courts should take the next step to combine these strands into a unified proportionality analysis when determining whether the Parliament has a legitimate interest in restricting a particular fundamental liberty through legislation. It is submitted that doing so would give full and substantial meaning to the concept of rights, and would avoid the ironic result that though the constitutional text guarantees that some rights are enjoyed only by Singapore citizens, there is in fact no difference in the way citizens and non-citizens are treated by the way in which the Constitution is currently interpreted. Furthermore, I argue that an originalist approach to interpreting a provision such as Article 14(2) does not bar the courts from adopting a proportionality approach.

In *Chee Siok Chin*, the High Court took the view that proportionality in judicial review is not part of Singapore law because it was also not traditionally part of the English common law. Rather, it is 'very much a continental European jurisprudential concept imported into English law by virtue of the UK's treaty obligations',[167] and since 'it is freely applied by the European Court of Human Rights in Strasbourg' it is 'taken into account in Britain under the Human Rights Act 1998'.[168] However, the source of the principle should not of itself hinder the Singapore courts from adopting it. Indeed, in the House of Lords decision of *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*[169] Lord Slynn of Hadley was prepared to say that 'even without reference to the Human Rights Act 1998 the time has come to recognise that this principle [of proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law'.[170]

Admittedly, the provisions in the Constitution permitting Parliament to impose limitations on fundamental liberties lack terms such as 'reasonable restrictions' and 'restrictions necessary in a democratic society', thus lending themselves to the idea that the courts must find to be constitutional whatever legislation falling within the enumerated grounds for limitation that the Parliament chooses to enact, regardless of how disproportionate or unreasonable it is. It is submitted that such an approach is undesirable. To quote Lord Denning MR out of context, the courts should interpret the Constitution 'in a broad reasonable way, according to the spirit and not to the letter'.[171]

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165 See Pt III.C, above.
166 See the text accompanying nn 85-88, above.
167 *Chee Siok Chin* (n 51) 616, [87].
168 ibid, quoting William Wade and Christopher Forsyth, *Administrative Law* (9th edn, Oxford University Press 2004) 366.
169 [2001] UKHL 23, [2003] 2 AC 295.
170 ibid 321.
171 *R v Preston Supplementary Benefits Appeal Tribunal, ex p Moore* [1975] 1 WLR 624, 631 (CA, England & Wales), cited in *R v Barnsley Supplementary Benefits Appeal Tribunal, ex p Atkinson* [1976]

Although balancing is criticized because an overarching metric for assigning value to competing interests is lacking, it must be recognized that the moral and policy reasoning that constitutional adjudication involves cannot be carried out in a rigid mathematical fashion. In addition, the concern that proportionality leads to a devaluation of rights may be countered by consciously giving stronger weight to rights during the third and fourth stages of the proportionality analysis. This can be regarded as a specific application of the presumption in favour of generosity.

Ultimately, the Singapore courts are likely to implement a proportionality analysis when interpreting the Constitution only if they conceive of their role in the legal system differently. They must see it as their duty to maximize the fundamental liberties guaranteed to people, and avoid literal, legalistic readings of the bill of rights. Indeed, there are signs that the courts have begun pulling back from the latter approach. For instance, in *Yong Vui Kong v Public Prosecutor* the Court of Appeal stated on an *obiter* basis that colourable legislation (that is, a statute which usurps the courts' role by amounting to a conviction of specific individuals), and 'legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being "law" when they crafted the constitutional provisions protecting fundamental liberties' can be struck down for non-compliance with Article 9(1) of the Constitution.[172] This provision contains no express words from which the Court could have reached its conclusion. The Court repeated this approach two years later in *Tan Eng Hong v Attorney-General*,[173] when it laid down the correct interpretation of Article 4 which declares the Constitution to be the supreme law of Singapore and that 'any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. On its face, the provision suggests that legislation predating the Constitution cannot be held invalid, but reading the constitutional text[174] purposively the Court determined otherwise.[175]

Under the proportionality approach, judges will possess a fair degree of discretion in determining whether a restrictive measure should prevail against a right. This should be regarded as a strength and not a shortcoming of constitutional adjudication. Rather than shying away from assessing the reasonableness of laws, the judiciary should recognize that this discretion enables it to express independent, considered views on key issues of the day. This stimulates public debate on them, thus promoting deliberative democracy; and engages the political branches of government in a constitutional dialogue.

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1 WLR 1047, 1048 [HC (QB), England & Wales]. Lord Denning was stating that a statutory tribunal should be allowed to interpret the statute empowering it to act with as little technicality as possible, without being subject to *certiorari* upon administrative law grounds.

172 *Yong Vui Kong v PP* (n 31) 500, [16]-[17].

173 *Tan Eng Hong* (n 159).

174 Articles 4 and 162 of the Constitution. The latter provision states: 'Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.'

175 *Tan Eng Hong* (n 159) 506–507, [59]-[60].

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